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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1314

MARK H. KROLL, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner Mark H. Kroll prays that a writ of certiorari issue to review the judgment and opinion entered by the United States Court of Appeals for the Fifth Circuit in the above-entitled proceeding on November 2, 1970.

OPINION BELOW

The opinion of the Fifth Circuit, rendered on November 2, 1970, is reported at 433 F.2d 1282 and is reprinted in the Appendix hereto, p. 1a, *infra.*

JURISDICTION

On November 2, 1970, the Fifth Circuit entered its judgment affirming the judgment of conviction entered by the United States District Court for the Southern District of Florida following a jury verdict finding the petitioner guilty of willful violations of 15 U.S.C. § 77q(a) and 18 U.S.C. § 1341, as well as of conspiracy in violation of 18 U.S.C. § 371. A timely petition for rehearing was denied by the Fifth Circuit on December 10, 1970. On a timely application, Mr. Justice Black on January 6, 1971, ordered that the time for filing this petition for writ of certiorari be extended to and including February 8, 1971.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED *

1. Whether, under Rule 14 of the Federal Rules of Criminal Procedure, it is an abuse of discretion to deny a motion for severance filed by a defendant in a complex conspiracy prosecution where such denial precludes his use of exculpatory testimony earlier given by the principal co-defendants.

2. Whether, in assessing the right to a speedy trial under the Sixth Amendment or under Rule 48(b) of the Federal Rules of Criminal Procedure, pre-indictment delays by the Government are to be considered where the indictment is filed within the applicable limitations period.

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* Petitioner reserves the right to urge and argue any questions presented in the petition for certiorari being filed in this proceeding by William Cahn, including the search and seizure question, that may affect the propriety of petitioner's conviction.

CONSTITUTION, STATUTE AND RULES

United States Constitution, Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . ."

Title 11 United States Code, Section 25(a)(10):

> "(a) The bankrupt shall . . . (10) . . . submit to an examination concerning the conducting of his business, . . . but no testimony given by him shall be offered in evidence against him in any criminal proceeding, except such testimony as may be given by him in the hearing upon objections to his discharge . . ."

Rule 14, Federal Rules of Criminal Procedure:

> *" Rule 14. Relief From Prejudicial Joinder.*
>
> "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial."

Rule 48(b), Federal Rules of Criminal Procedure:

> *"Rule 48. Dismissal.*
>
> * * * * * * * * *
>
> "(b) By Court. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who

has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

STATEMENT OF THE CASE

A. The Motion To Dismiss the Indictment

On February 15, 1966, the federal grand jury for the Southern District of Florida filed a 31-page indictment against the petitioner Kroll and seven other defendants. The indictment was divided into three categories of charges: (1) seven counts alleged the use of the mails in furtherance of a scheme to defraud in violation of 15 U.S.C. § 77q(a); (2) seven counts alleged mail fraud in violation of 18 U.S.C. § 1341;[1] and (3) one count alleged a conspiracy to violate the aforementioned statutes in violation of 18 U.S.C. § 371. Both the alleged scheme to defraud and the alleged conspiracy, as to which 24 overt acts were specified, were said to have begun about January 20, 1958, and to have continued until about December 31, 1961.

The indictment was thus filed more than four years after the termination on December 31, 1961, of the alleged conspiracy and scheme to defraud, although the filing was within the period of five years prescribed by the applicable statute of limitations. This delay between the termination of the alleged conspiratorial scheme and the return of the indictment led to claims by the petitioner Kroll and other defendants that the delay resulted from "deliberate, or at least negligent, actions on the part of the prosecutor," was "purpose-

[1] Three of these seven counts charging violations of 18 U.S.C. § 1341 were dismissed on motion of the Government.

ful and oppressive," and was calculated to furnish the Government additional time "to secure facts from the bankruptcy actions and the state prosecution" that had been instituted against some of the corporations or defendants here concerned.[2]

More specifically, on September 8, 1966, petitioner filed a motion to dismiss the indictment under Rule 48(b), Fed. R. Crim. Proc., alleging that this delay had denied him his constitutional rights to due process under the Fifth Amendment and to a speedy trial under the Sixth Amendment, and that the facts had been known to the Government at least "from the time of the bankruptcy of American Bonded Mortgage and other related corporations in February of 1962, and from the commencement of a State of Florida prosecution in January, 1963, based on similar facts." App. 88.[3] Petitioner alleged that due to this unreasonable delay he could not safely go to trial because (a) the complexities charged in the indictment could not be defended after so long a delay, (b) documents had become scattered or lost during the four-year period, (c) witnesses with knowledge of the facts had become hard to find after so long a passage of time, (d) the memory of all individuals concerned had been dimmed by this passage of time, and (e) the petitioner had not been allowed reasonable time in which to discover the materials to be used against him and to prepare to defend himself. App. 88-89.

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[2] In its brief to the Fifth Circuit, the Government asserted (p. 71) that "In the case at bar, the S.E.C.'s criminal reference report was referred to the U.S. Attorney in November 1965 and the indictment was returned on February 15, 1966." But the S.E.C. investigation extended back at least as far as 1960.

[3] The petitioner renewed this motion to dismiss after the trial and conviction; the renewed motion was denied. App. 4193.

The District Court denied petitioner's motion to dismiss and the Fifth Circuit, on the appeal from petitioner's conviction on all counts, later held that the constitutional right to a speedy trial and the rights granted by Fed. R. Crim. Proc. 48(b) "do not accrue to a defendant until after a prosecution is instituted . . . . . Any delay between commission of the crime and indictment is controlled by the applicable statute of limitations." Appendix hereto, p. 6a, *infra*. The Fifth Circuit added that "the defendants have not sufficiently demonstrated any prejudice stemming from the lapse of time prior to indictment." Appendix hereto, p. 6a, *infra*.

The trial itself commenced on November 14, 1966, before a jury in the District Court for the Southern District of Florida. The trial covered 26 days and ended on December 23, 1966, when the jury returned a verdict of guilty as to all defendants on all the counts submitted to the jury. App. 4162-4167. The appendix record on appeal to the Fifth Circuit consisted of eight printed volumes, containing nearly 4300 pages. The Fifth Circuit affirmed all convictions in its opinion rendered on November 2, 1970.

B. The Motion To Sever Petitioner's Trial

At the commencement of the trial, prior to the opening arguments, the trial judge read the entire 31-page indictment to the jury, cautioning the jury that the indictment was not evidence of any kind against the defendants. Later, at the end of the trial after the summations had been delivered, the judge read to the jury Count I of the indictment, summarized the remaining counts, and again cautioned the jury that the indictment did not constitute proof. App. 4074-4100.

In general, the indictment alleged that from January 20, 1958—when the petitioner Kroll allegedly acquired control of the American Bonded Mortgage Company (ABM)—and for nearly four years thereafter, the various defendants engaged in a scheme to defraud Florida investors. This scheme was said to have been accomplished through an intensive campaign whereby risky and practically worthless mortgages were purchased from sources affiliated with ABM, ostensibly insured for principal amount and interest through a financially unsound insurance company, and sold to the public by means of allegedly false and misleading advertising and other statements made directly to investors.

The indictment cast the petitioner Kroll as the dominating figure in this alleged scheme to sell securities by fraudulent means. He was alleged to have acquired a controlling stock interest in the American Bonded Mortgage Company (ABM), the central corporate entity in the alleged scheme, and it was further asserted in the indictment that Kroll "managed, operated, directed, controlled and dominated the activities, affairs and policies of ABM," as well as those of the 15 listed "affiliates of ABM."

Paragraph 3 of Count I of the indictment, which paragraph was incorporated by reference in all the other 14 counts and which was read to the jury both at the start and at the end of the trial, described the role of the petitioner Kroll in the alleged scheme as follows:

> "About January 20, 1958, KROLL, individually and through Agency Corporation of America, Inc., acquired controlling stock interest in ABM, a Florida corporation engaged in the business of fi-

nancing mortgage loans, and thereafter, together with the other defendants, managed, operated, directed, controlled and dominated the activities, affairs and policies of ABM, including those of FBC; Surety Guaranteed Investment Corporation ("SGI"); Aspic Investments Corporation ("Aspic"), formerly All State Purchasing and Investment Corporation; Flora Sun Corporation ("Flora Sun"), formerly Apollo Beach, Inc.; Award Homes, Inc. ("Award"), formerly General Assured Mortgage Company, Inc., The Hoyle Corporation ("Hoyle"); All Florida Homes, Inc. ("All Florida"); Apollo Construction Company ("Apollo"); Alan Road Construction Company ("Alan"); Apollo Beach Yacht Club, Inc. ("Yacht"); Appollo Beach Utility Company ("Utility"); Appollo Beach Shopping Center ("Shopping"); Perimeter, Inc. ("Perimeter"); Old South Plantation, Inc. ("Old South"); and Flora Sun of Canada, Inc. ("Canada"). These companies (hereinafter referred to as affiliates of ABM) were acquired, organized, established and utilized in performing various phases of the overall business of ABM and were operated under common direction as one business entity and for the most part, maintained their places of business and records in the offices of ABM at 529 West Flagler Street, Miami, Florida. KROLL also owned, acquired, directed and dominated the affairs of Michigan Surety Company (Michigan), A Michigan corporation, and Pan American Surety Corporation (Pan American), a Florida corporation, and was president and a director of these corporations which issued insurance bonds purportedly guaranteeing the investors against loss in any form on their purchases of the aforesaid securities from ABM and FBC. He also owned, controlled, dominated and managed Wilmark Insurance Agency, Inc. (Wilmark) and Agency Corporation of America (ACA), Ohio corpora-

> tions, and National Leasing Company, Inc. (National), Insurance Corporation of America, Inc. (ICA) and United Public Insurance Co. (United), Indiana corporations, which were used in effecting several of the transactions herein alleged and through which funds and other assets of ABM and its affiliates were channeled, appropriated and used for his benefit and for the benefit of the other defendants."

Two of the other defendants, William Cahn and William Criswell, were described in the indictment as in executive or administrative control of ABM's operations under Kroll's direction. It was principally through Cahn and Criswell that Kroll assertedly dominated ABM and became the principal figure in the fraudulent scheme.

On September 23, 1966, prior to trial, the petitioner Kroll filed an amended "Motion For Relief From Prejudicial Joinder Under Rule 14, Federal Rules of Criminal Procedure." App. 92. This motion sought to sever the trial of Kroll from that of the other defendants for the following reasons:

(1) Kroll's participation in the alleged offenses had been described in the indictment as limited to his ownership of the controlling interest of the principal corporations listed therein, including ABM, and to his dominating and controlling force in the activities and policies of the various corporations through the persons of co-defendants Cahn and Criswell.

(2) If Kroll were tried jointly with the other co-defendants, particularly Cahn and Criswell, he would be deprived of his right and opportunity to call such co-defendants as witnesses on his behalf at the trial,

since they could not be required to testify as witnesses in these circumstances.

(3) If the co-defendants, particularly Cahn and Criswell, were called upon as witnesses for Kroll, they would testify that Kroll neither owned nor controlled nor dominated through Cahn and Criswell any of the affairs, activities or policies of ABM or the other corporations, as alleged in the indictment. The motion stated that Kroll based this belief "upon the evidence that both co-defendants have heretofore so testified in former proceedings in this Court connected with the bankruptcy of the named corporations." App. 93.

(4) The co-defendant Cahn, as the principal of various corporations (ABM, Aspic and Flora Sun) under examination in bankruptcy proceedings in the Southern District of Florida,[4] pursuant to the authority of 11 U.S.C. §§ 25 and 44, on January 15, 1962, testified that Kroll "did not own control of American Bonded Mortgage or other bankrupts under examination," and that Kroll did not dominate or control, through Cahn or any other person, the affairs, activities or policies of any of the defunct corporations. App. 94. The co-defendant Criswell gave similar testimony on January 2, 1962, before the Referee in Bankruptcy. The motion then stated (App. 94):

> "It is unlikely that either of the co-defendants, unfettered with their private considerations of

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[4] The bankruptcy proceedings in question were:

(1) In the Matter of American Bonded Mortgage Co., Inc., a Florida corporation, No. 5102-M-BK-ECC,

(2) In the Matter of Aspic Investments Corporation, a Florida corporation, No. 180-62-M-BK-ECC, and

(3) In the Matter of Flora Sun Corporation, a Florida corporation, No. 55-62-M-BK-ECC.

> their own defense, in a separate trial from that of the movant [Kroll], would testify to the contrary. Further, in this proceeding for the reorganization of the defunct corporations, through the Court's receiver and with this Court's approval, a proposed order was submitted to the Honorable Judge Emett Choate based upon all matters including the aforesaid examination of CRISWELL and CAHN, findings of fact and conclusions of law to the effect that, unlike as charged in the Indictment, CAHN rather than KROLL held all of the issued and outstanding stock of the defunct corporations and that he was under 'no legal obligation to hold the same for any nominee' and, further, that CAHN, not KROLL as charged in the Indictment, controlled and dominated the operations, policies and management of the various defunct corporations and its [their] subsidiaries; all of which matters relate materially and relevantly to the movant's defense."

(5) In the event that either Cahn or Criswell, or both, should choose to testify in their own defense in a joint trial with Kroll, Kroll would be deprived of the use for any purpose whatsoever, including refreshing of memory and impeachment, of their testimony in the bankruptcy proceedings in his own interest, since each of the co-defendants would be entitled to claim immunity from the use of such statements in any criminal proceedings in which they are defendants, under the immunity provision of 11 U.S.C. § 25. Common sense would dictate, said the motion, that these co-defendants would invoke that right inasmuch as the bankruptcy examination contained many questions and answers on all manner of subjects related to the bankruptcy which counsel for each co-defendant would likely find to be an interference with the orderly conduct of his de-

fense. On the other hand, the motion asserted, in a separate trial Kroll could make free and unfettered use of the statements as the occasion demanded; Cahn and Criswell could then properly be subpoenaed as witnesses and they could not claim that their prior statements were immunized under 11 U.S.C. § 25.

(6) Kroll further claimed in this motion that, "by reason of the prosecution's arbitrary delay in instituting prosecution in this cause notwithstanding complete knowledge of all facts for a period of approximately four years," he would now have to place "substantial reliance upon the statements of the codefendants as outlined herein since the passage of time has made crucial and pertinent documents unavailable and has dimmed the memory of potential defense witnesses on the material and critical issue of movant's domination of the affairs and policies of the corporations." App. 96.

(7) Kroll's motion additionally claimed that if the said co-defendants should elect to testify at the joint trial "he or they would have such an interest in the outcome of the case as might influence the jury unfavorably against them in determining credibility of their testimony in favor of the movant; whereas if movant were tried separately such defendants, in testifying on behalf of the movant, would have a different and less personal interest in the outcome of movant's case, and the jury in determining their credibility would not be unduly influenced by their personal interest therein." App. 96-97.

(8) Finally, this motion to sever asserted that if tried jointly with the co-defendants Kroll would have to relinquish unfettered control over his defense, since counsel for the co-defendants would seek to infer ex-

clusive culpability on Kroll to make him appear as the mastermind and dominant character in the scheme to defraud, as the indictment alleged, whereas the co-defendants would be made to appear as "innocent dupes of the wrongdoing Svengali." App. 97.

The District Court, on October 7, 1966, entered an order denying without reasons Kroll's amended motion for relief from prejudicial joinder under Rule 14. App. 99. One immediate result of that denial was to cause Kroll's trial attorney, who until this point had also represented the co-defendant Cahn, to move for permission to withdraw as counsel for Cahn since "it would now be impossible . . . to represent both defendants in the same trial." App. 101. That permission was granted.

Just before the commencement of the trial on November 14, 1966, the petitioner Kroll renewed his motion for severance "on the ground that he cannot safely go to trial and prepare an adequate defense due to the inability of securing favorable testimony to him from his co-defendants in the same trial, a fact made more evident as a result of the examination and inspection of the documents to the extent permitted and accomplished at this date." App. 139.[5] This motion, which was denied, was motivated in part by the fact that, pursuant to a court order dated November 3, 1966, the petitioner's counsel had had only a few days to examine the voluminous documents that the Government intended to introduce at the trial. These documents had long been unavailable to the petitioner and the other co-defendants, having been in the possession of state

[5] The motion for severance was again renewed and again denied shortly after the jury was empanelled and the trial commenced. App. 273.

and federal agents over a period of years during the pendency of the state prosecution, the bankruptcy proceeding and the S.E.C. investigation. When petitioner's counsel was allowed to see these vast numbers of documents, they were largely in a state of disorder and disarray; and the short time available for inspection before trial made an intelligent inspection and evaluation impossible. Some 400 of these unindexed documents had been marked by the Government for identification as possible exhibits, and some of the exhibits so marked constituted, as single exhibits, entire filing cabinets filled with papers. A motion for a continuance to permit the petitioner's counsel more time to examine the three rooms of cabinet drawers filled with these documents was denied. App. 136.

As had been predicted in petitioner's motion to sever, at the joint trial both Cahn and Criswell declined to take the stand as witnesses on behalf of the petitioner. App. 2945, 2947. Petitioner's attempts to offer, in lieu of their appearance as witnesses, the testimony of Cahn and Criswell in the 1962 bankruptcy proceedings were rebuffed by the trial judge, who ruled that such testimony was privileged or immunized by virtue of 11 U.S.C. § 25.[6] Likewise denied was petitioner's effort to introduce the order of Judge Choate of the Southern District of Florida, who had conducted the bankruptcy proceedings and who had considered the testimony in question of both Cahn and Criswell. App. 3127-3128. That order, issued in September of 1966 shortly before the commencement of

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[6] The Government also objected to the introduction of such prior testimony on the ground that it had not been a party to the bankruptcy proceedings and had not had the opportunity to cross-examine Cahn and Criswell at that time. App. 2946, 2948.

the instant trial, made the following findings and determinations:

1. William Cahn "received and held custody of all of the issued and outstanding stock of American Bonded Mortgage Co., Inc." and of Flora Sun Corporation, and "was under no legal obligation to hold the same for any nominee."
2. William Cahn "dictated, controlled and dominated the operations, policies and management of American Bonded Mortgage Co., Inc., and Flora Sun Corporation by and through the appointment of Wilbur Jones as President of Flora Sun Corporation and William T. Criswell as President of American Bonded Mortgage Co., Inc."
3. William Cahn "as sole stockholder and chief executive officer of Aspic Investments Corporation dictated, controlled and dominated its policies and operations and the policies and operations of its subsidiaries."
4. William Cahn, in short, "supervised, dominated and controlled the business affairs of the respective debtors [ABM, Aspic and Flora Sun] and their subsidiaries." Flora Sun was accordingly declared to be "an alter ego" of Aspic.

During the course of the joint trial, the co-defendants Cahn and Criswell took the stand in their own defense. Upon examination, Cahn testified that after he became associated with ABM and its affiliates he ran the companies and determined their policies. App. 3163-3168, 3176, 3187, 3201, 3317-3318. So far as Kroll was concerned, Cahn testified that Kroll "had some ideas sometime, but he never had any voice" in determining matters of ABM policy, and it "was established right at the start" that Kroll was to have no control over Cahn so far as policies and operations were concerned. App. 3168. Petitioner's counsel did not cross-examine Cahn.

The co-defendant Criswell's testimony, in response to questions put both by his own counsel and by petitioner's counsel, was to the effect that petitioner Kroll had never instructed him how to approach or carry out his duties with ABM. Criswell denied that Kroll had ever dictated policies to Criswell concerning ABM or that Kroll ever dominated or controlled Criswell's activities or duties in any way. App. 3458-3459, 3464.

The jury apparently did not believe such testimony by Cahn and Criswell, since the jury's verdict as to the petitioner's guilt can only rest upon a determination that, as alleged in the indictment, Kroll owned, dominated and controlled ABM and its affiliates. Petitioner's motion for a new trial, which was denied, renewed the claim that the trial judge had erred "in denying this defendant's and the other defendants' several motions for severance." App. 4195-4196.

On the appeal, the Fifth Circuit rejected petitioner's claims regarding his right to a severance. In the Fifth Circuit's words (Appendix hereto, p. 7a, *infra*),

> ". . . when Cahn and Criswell took the stand in their own behalf they made statements tending to exculpate Kroll. The jury was free to accept this testimony. Kroll has not demonstrated an abuse of discretion by the trial court in this respect. *Smith* v. *United States*, 5 Cir. 1967, 385 F.2d 34."

REASONS FOR GRANTING THE WRIT

In *Grunewald* v. *United States*, 353 U.S. 391, 404 (1957), it was emphasized that "Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." The decision below merits review by this Court since it presents several important variants arising from

such prosecutorial nets that warrant disfavor and that have caused confusion and conflict in the lower federal courts.

Both the severance and the speedy trial problems here present are found in the context of a complex conspiracy trial involving seven co-defendants charged with perpetrating a highly sophisticated scheme to defraud small investors.[7] To defend against the blunderbuss conspiracy charge, as well as the other charges, not only required a financial unraveling of complicated inter-corporate dealings and operations ill suited to the comprehension of the average lay juror but an attempt to make petitioner's defense "stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together." *Krulewitch* v. *United States,* 336 U.S. 440, 454 (Jackson, J., concurring, 1949). As Mr. Justice Jackson there added, "A co-defendant in a conspiracy trial occupies an uneasy seat." That uneasiness has been unnecessarily augmented by the decision below.

1. The Court Below Is in Conflict With the Seventh Circuit as to the Right of Severance in a Conspiracy Case Where Prior Exculpatory Testimony of Co-defendants Is Rendered Unavailable.

The Fifth Circuit ruled that the fact that "when Cahn and Criswell took the stand in their own behalf they made statements tending to exculpate Kroll" constituted a complete answer to petitioner Kroll's claim that the unavailability of the prior exculpatory testi-

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[7] The prosecutor, in his opening remarks to the jury, stated that "the case now before you, as Judge Mehrtens has indicated and as I think all of us have pointed out to you earlier, is a rather complicated case. It is probably more complicated than most cases in the courts, not only here but in other courts." App. 298.

mony of Cahn and Criswell necessitated a severance of Kroll's trial under Rule 14, Fed. R. Crim. Proc. But that ruling only exacerbates the importance of the severance problem and the confusion and conflict of decisions that underlie the Fifth Circuit's treatment of the problem.

To begin with, it is well established that where a witness has given incriminating testimony at previous judicial proceedings and that witness is presently unavailable, such testimony may be utilized by the prosecution at the defendant's trial. *Barber* v. *Page,* 390 U.S. 400, 405 (1965); *Mason* v. *United States,* 408 F.2d 903, 905-906 (10th Cir. 1969). And that rule prevails even where the witness is present in court at the later trial but invokes a claim of privilege and refuses to testify. *People* v. *Pickett,* 339 Mich. 294, 63 N.W.2d 681 (1954), cert. denied, 349 U.S. 937; *Bridges* v. *State,* 26 Ala. App. 1, 152 So. 51 (1933), cert. denied, 292 U.S. 633. This rule also applies where the person claiming the privilege of refusing to testify at the subsequent trial is a co-defendant, a fellow conspirator or an accomplice. *State* v. *Hill,* 143 Kan. 791, 57 P.2d 49 (1936); *Rose* v. *Rex (Quebec),* 3 Crim. R. 277, 88 Can. Crim. Cas. 114 (1947); *Bridges* v. *State, supra.*[8]

By the same token, a defendant has the right to use the prior exculpatory testimony of a witness or a co-defendant who is unavailable at the subsequent trial or who asserts a privilege not to testify, at least where

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[8] "It has generally been held that evidence given at a preliminary hearing or a former trial by a codefendant or an accomplice, who claims the privilege of refusing to testify at a subsequent trial, may be used by the prosecution at such later trial." Annotation, 45 A.L.R.2d 1354, 1357. See also 29 Am.Jur.2d, Evidence § 758, p. 828.

use of such testimony would not conflict with the asserted privilege. See *United States* v. *Echeles,* 352 F.2d 892, 898 (7th Cir. 1965); see also *Washington* v. *Texas,* 388 U.S. 14, 22-23 (1967). But the critical problem raised in the instant case is whether a severance is required if a separate trial is the only way in which the defendant can make effective use of his co-defendant's exculpatory testimony.

The dilemma and the difficulties imposed on petitioner by a joint trial with Cahn and Criswell were very real. The decisive factor in petitioner's connection with the alleged conspiracy and scheme to defraud was said to be his ownership, control and domination of ABM, as well as his control and domination of Cahn and Criswell. Vital to petitioner's defense was the testimony of Cahn and Criswell that neither they nor ABM had been under petitioner's domination[9]—and

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[9] In *United States* v. *Berman,* 24 F.R.D. 26, 28 (S.D.N.Y. 1959), the defendant Berman made a similar claim that only certain co-defendants could testify that he had no connection with the allegedly fraudulent stock selling scheme. The court denied Berman's pre-trial motion for severance, which had urged that since the co-defendants might fail to take the stand at a joint trial Berman would be unable to call them as witnesses if he were tried at the same time and hence would be deprived of their exculpatory testimony. The motion further asserted that if Berman were tried separately he would have the right to call the co-defendants and they might be willing to testify on his behalf; if they claimed their Fifth Amendment privilege, however, "he would still have whatever advantage there might be from their appearance on the stand before the jury." 24 F.R.D. at 28-29.

In denying the motion, the court said the questions raised "should not be determined at this relatively early stage of the proceedings but should be left for determination at the trial." For all that then appeared, the court said, the co-defendants may all take the stand or some might not go to trial at all.

particularly such testimony given in the earlier bankruptcy proceedings when Cahn and Criswell were not under the prejudicial cloud of a criminal indictment.

At the joint trial, Cahn and Criswell declined to appear as witnesses for the petitioner. And petitioner was precluded from any use of their prior testimony by virtue of the trial court's ruling that the prior bankruptcy testimony was immunized under the provision of 11 U.S.C. § 25(a)(10) that the testimony of a bankrupt shall not "be offered in evidence against him in any criminal proceeding." Thus the bankruptcy testimony could not be used even to refresh memories or to impeach contrary testimony, should Cahn or Criswell take the stand.

It is in this context that the decision below, affirming the refusal to grant a severance to the petitioner, comes into direct conflict with the Seventh Circuit's decision in *United States* v. *Echeles,* 352 F.2d 892 (7th Cir. 1965). In *Echeles,* one Arrington, a co-defendant in a conspiracy trial, had previously stated in open court that Echeles was innocent of the charges in question. Echeles filed a pre-trial motion to sever his trial from that of Arrington, asserting that at a joint trial Echeles would be deprived of his right to call Arrington as a witness and to get the benefit of Arrington's prior exculpatory statements. The Seventh Circuit held that the trial court had abused its discretion under Rule 14 in not granting the pre-trial severance motion, stating that (352 F.2d at 898):

> " . . . we hold merely that, having knowledge of Arrington's record testimony protesting Echeles' innocence, and considering the obvious importance of such testimony to Echeles, it was error to deny the motion for a separate trial. It should have

> been clear at the outset that a fair trial for Echeles necessitated providing him the *opportunity* of getting the Arrington evidence before the jury, regardless of how we might regard the credibility of that witness or the weight of his testimony."

Echeles differs from the instant case only in the fact that at the joint conspiracy trial Echeles did not and could not call Arrington as a witness, whereas in the instant case Cahn and Criswell, after declining to appear as witnesses for petitioner at the conspiracy trial, took the stand in their own defense and were thereby subject to cross-examination on the exculpatory matters. But that difference is not vital. In *Echeles,* use of the exculpatory testimony was precluded by the unavailability of Arrington as a witness, although had Arrington taken the stand at the joint trial Echeles' counsel presumably could have freely examined him about his prior exculpatory remarks and brought to the jury's attention the circumstances under which the prior remarks had been made. But here, where Cahn and Criswell were defendants in the criminal conspiracy proceedings, the ban imposed by 11 U.S.C. § 25 (a)(10) precluded any use or reference to the prior bankruptcy testimony of Cahn or Criswell, even on cross-examination when they took the stand in their own defense.

Thus in both *Echeles* and this case the defendant in question was effectively deprived of the use of the prior exculpatory testimony. Only a severance could cure that difficulty. As stated in 8 Moore's Federal Practice ¶ 14.04[4], p. 14-49 (2d ed. 1970), "where it is clear from the record that the codefendant would testify in exculpation if a severance were granted,

denial of a severance is an abuse of discretion."[10] This, then, is a classic instance where severance is necessary to insure a full and fair presentation of a defense to criminal charges.

It need only be added that the availability of Cahn and Criswell for cross-examination at the joint trial did not cure the unfairness of denying severance to petitioner. Such cross-examination, limited by the scope of the direct examination, could not convey to the jury the nature and circumstances of the prior bankruptcy testimony. The jury could not be made aware of such testimony and thus the jury could not give credence to such testimony as having been given by Cahn and Criswell at a time before they were under criminal suspicion. As it was, the jury could only view the exculpatory statements made on cross-examination as those emanating from alleged co-conspirators who the jury might think were still under the domination of the petitioner. And those co-defendants could not escape the testimonial fetters imposed by the demands of their own defense.

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[10] But see *Gorin* v. *United States*, 313 F.2d 641, 645-646 (1st Cir. 1963), where the court deemed "unrealistic" the argument in a severance motion that the testimony of co-defendants was available only if the defendants were tried separately so they could put the co-defendants on the stand. "There is no reason to think," said the First Circuit, "that a co-defendant would be any more willing to waive his constitutional privilege against self-incrimination when called as a witness at a separate trial than he would be willing not to insist upon his privilege as a defendant not to take the stand."

In the instant case, on the other hand, if Cahn and Criswell were to refuse to testify as witnesses at a separate trial for petitioner, the petitioner could then introduce their prior bankruptcy testimony—which would then be free of its § 25 immunity since the proceeding would not then be a criminal one involving either Cahn or Criswell.

This Court has noted that exculpatory statements given when an accused person is under suspicion "become questionable" and "call for corroboration." *Opper* v. *United States,* 348 U.S. 84, 92 (1954). To be limited to such "questionable" testimony in presenting critically important exculpatory evidence hardly comports with the fundamental right "to offer the testimony of witnesses, and to compel their attendance, if necessary . . . [and] to present the defendant's version of the facts as well as the prosecutor's to the jury so it may decide where the truth lies." *Washington* v. *Texas,* 388 U.S. 14, 19 (1967). And a denial of severance merely because of the availability of such "questionable" testimony or because of "the expense of several long trials" (p. 8a, *infra*) should be considered an abuse of discretion under Rule 14. See *Opper* v. *United States,* 348 U.S. 84, 95 (1954).

Because this Court has not previously considered the propriety of severance where exculpatory evidence is otherwise lost and because of the lack of any definitive guidelines for lower courts to follow in treating with such severance problems, the grant of certiorari becomes appropriate. Such appropriateness, of course, is augmented by the direct conflict between the decision below and the Seventh Circuit's decision in *Echeles,* as well as by the apparent confusion among other federal courts as to the availability of severance in this general context. See *Brown* v. *United States,* 375 F.2d 310, 316-317 (D.C. Cir. 1967); *United States* v. *Kahn,* 381 F.2d 824, 838 (7th Cir. 1967); *United States* v. *Berman,* 24 F.R.D. 26, 28 (S.D.N.Y. 1959).

2. The Decision Below That Pre-indictment Delays Are Excluded From the Measurement of the Right to a Speedy Trial Raises an Important and Unresolved Problem, as to Which Lower Courts Are in Conflict.

The Fifth Circuit, in reliance upon its own precedents,[11] has here held that "the Sixth Amendment right to a speedy trial and the rights granted by F.R. Crim. P. 48(b) do not accrue to a defendant until after a prosecution is instituted. . . . Any delay between commission of the crime and indictment is controlled by the applicable statute of limitations [which was here satisfied]." Appendix hereto, p. 6a, *infra*. That ruling, the Fifth Circuit conceded, is in conflict with "the reasoning of *United States* v. *Parrott,* 248 F. Supp. 196 (D.D.C. 1965), wherein an indictment was dismissed in part because the court found that the defendants had been unduly prejudiced by unexcused pre-indictment delay."

But the conflict and the importance of this problem of measuring the period to which the right of speedy trial attaches are of greater scope than a dispute between the Fifth Circuit and the District Court for the District of Columbia. Certain other Circuits have agreed with the Fifth Circuit's view. See, e.g., *Parker* v. *United States,* 252 F.2d 680, 681 (6th Cir. 1958); *Terlikowski* v. *United States,* 379 F.2d 501, 503-504 (8th Cir. 1967); *United States* v. *Panczko,* 367 F.2d

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[11] The court cited *United States* v. *Grayson,* 416 F.2d 1073, 1076-1077 (5th Cir. 1969); *Harlow* v. *United States,* 301 F.2d 361 (5th Cir. 1962); and *Bruce* v. *United States,* 351 F.2d 318 (5th Cir. 1965). Those cases hold that the right to a speedy trial, with reference to the Fifth and Sixth Amendments and Rule 48(b), Fed. R.Crim. Proc., is not violated by a delay in indictment, so long as the applicable statute of limitations is followed.

737, 739 (7th Cir. 1966); *Venus* v. *United States,* 287 F.2d 304, 307 (9th Cir. 1960); and see *United States* v. *Simmons,* 338 F.2d 804, 806-807 (2d Cir. 1964). On the other side of the coin, the District of Columbia Circuit and the District Court in that Circuit have rather consistently taken into account pre-indictment delays in computing both the specific right to a speedy trial and the more general due process right to be protected against such delays. See, e.g., *Ross* v. *United States,* 349 F.2d 210, 215 (D.C. Cir. 1965); *Powell* v. *United States,* 352 F.2d 705, 708 (D.C. Cir. 1965); *Mann* v. *United States,* 304 F.2d 394, 396-397, n. 4 (D.C. Cir. 1962); *Nickens* v. *United States,* 323 F.2d 808, 809-811, n. 2 (D.C. Cir. 1963); and concurring opinion of Judge Wright at 812-813; *United States* v. *Reed,* 285 F. Supp. 738, 740 (D.D.C. 1968); *United States* v. *Parrott,* 248 F. Supp. 196 (D.D.C. 1965). See also to the same effect, *Sanchez* v. *United States,* 341 F.2d 225, 228, n. 3 (9th Cir. 1965); *United States* v. *Provoo,* 176 F.R.D. 183 (D. Md. 1955), aff'd per curiam, 350 U.S. 857. Such a conflict deserves resolution by this Court.

This Court has emphasized that the speedy trial right "is an important safeguard to prevent undue and oppressive incarceration prior to trial" and "to minimize anxiety and concern accompanying public accusation." *United States* v. *Ewell,* 383 U.S. 116, 120 (1966). And the *Ewell* decision, *supra,* at 122, also indicated that "the applicable statute of limitations . . . is usually considered the primary guarantee against bringing overly stale criminal charges." But this Court has never decreed that compliance with the applicable limitations statute necessarily and always precludes a speedy trial claim, as the Fifth Circuit has here held.

Indeed, only last Term, in *Dickey* v. *Florida,* 398 U.S. 30 (1970), Mr. Justice Brennan, joined by Mr. Justice Marshall, noted in his concurring opinion the viability and importance of this very problem. After first noting (p. 44) the lower court conflicts as to the applicability of pre-indictment delays to the speedy trial right, Mr. Justice Brennan summarized the importance of that critical and unresolved problem (pp. 45-46):

> "The applicability of the safeguard to delays occurring before arrest or indictment poses a more difficult question. A few courts have reasoned that the language of the Sixth Amendment precludes its application then, and prior to arrest or indictment not all of the interests protected by the right are threatened. The accused suffers no preconviction penalty, since his freedom is not impaired by actual imprisonment or conditioned release. He suffers none of the personal or social disabilities that flow from public accusation. And, so far as society's interest in the effective prosecution of criminal cases is concerned, delay on the government's part need not impair its ability to prove the defendant's guilt beyond a reasonable doubt.
>
> "Deliberate governmental delay designed to harm the accused, however, constitutes abuse of the criminal process. It lessens the deterrent value of any conviction obtained. And it very probably reduces the capacity of the accused to defend himself; unlike the prosecution, he may remain unaware that charges are pending and thus fail to take steps necessary to his defense. Accordingly, some of the interest protected by the Speedy Trial Clause can be threatened by delay prior to arrest or indictment. Thus, it may be that for the purposes of the clause to be fully realized, it must apply to any delay in the criminal process that

> occurs after the government decides to prosecute and has sufficient evidence for arrest or indictment."

And it might be added that the very first words of Rule 48 (b) refer to an "unnecessary delay in presenting the charge to a grand jury" as a basis for dismissing an indictment. To give effect to those words would require utilization of pre-indictment delays in assessing a motion to dismiss an indictment under Rule 48(b). Such an interpretation of the rule may be appropriate if not necessary to give full realization to what Mr. Justice Brennan described as the purposes of the Speedy Trial Clause of the Sixth Amendment.

Review and resolution of this recurring problem in the administration of federal criminal justice are made no less appropriate by the Fifth Circuit's comment that the defendants, including petitioner, "have not sufficiently demonstrated any prejudice stemming from the lapse of time prior to indictment." Appendix hereto, p. 6a, *infra*. The petitioner has made charges, undenied on this record, that during the four-year pre-indictment delay many documents essential to his defense in this complex case became scattered and lost, some witnesses became difficult to find, and memories of all individuals concerned were dimmed by the passage of time. Moreover, the petitioner alleged without contradiction on the record that the Government had known of the alleged crimes years before the filing of the indictment and was thus dilatory, without cause, in seeking the indictment. Such delay was said to be unreasonable and arbitrary. App. 88-89.

In any event, the courts below have not attempted to assess the prejudice accruing to petitioner under a

standard which permits pre-indictment delays to be counted in resolving this claim to a speedy trial. Until petitioner's proof of prejudice has been tested against that standard, it cannot properly be said that petitioner has "not demonstrated any prejudice stemming from the lapse of time prior to indictment." And because the pre-indictment factors are so completely within the knowledge of the Government, it may be that the burden is not on the petitioner to prove prejudice but on the Government to prove the reasonableness of the delay and the lack of prejudice to the petitioner.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari shoud be granted. Petitioner reserves the right to urge and argue any additional questions presented in the petition for certiorari being filed by the co-defendant William Cahn that may also affect the legal or constitutional propriety of petitioner's conviction.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24583

MARK H. KROLL, WILLIAM CAHN, WILLIAM CRISWELL, JACK CHERNAU, JOHN S. HUNT, ROBERT C. BROWN and FRED H. ADLER, *Appellants,*

v.

UNITED STATES OF AMERICA, *Appellee.*

Appeals from the United States District Court for the Southern District of Florida

(November 2, 1970)

Before PHILLIPS*, BELL and SIMPSON, Circuit Judges

SIMPSON, Circuit Judge: The appellants, Mark H. Kroll, William Cahn, William Criswell, Jack Chernau, John S. Hunt, Robert C. Brown and Fred H. Adler, are here seeking relief from judgments of conviction entered after jury verdict of guilty[1] in the district court. They raise a

* Honorable Orie L. Phillips of the Tenth Circuit, sitting by designation.

[1] Each of the seven appellants was convicted under seven counts of willful violation of Title 15, U.S.C. § 77q(a) (use of the mails in furtherance of a scheme to defraud in the sale of securities), four counts of willful violation of Title 18, U.S.C. § 1341 (use of the mails in furtherance of a scheme to defraud), and one count of violation of Title 18, U.S.C. § 371 (conspiracy).

myriad [2] of grounds upon which they claim that the convictions are defective. We affirm.

The indictment charged and the jury found that the defendants had engaged in a scheme to defraud investors in the offer and sale, through American Bonded Mortgage Company, Inc. (ABM), and affiliated companies, of notes secured by mortgages, promissory notes, evidences of indebtedness, investment contracts and mortgage insurance bonds during the period from about January 20, 1958 to about December 31, 1961.

The facts of this case are multi-faceted and extremely complicated. Because of the nature of the challenges raised

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[2] At least twenty-five grounds of error are asserted by one or more appellants. This opinion will take up and dispose of what we consider to be the eleven most serious grounds. The other fourteen which we record below simply to indicate that they have not been overlooked, are found completely without merit and not warranting discussion here. Some border on the frivolous. These grounds are:

(1) Inflammatory prosecutorial remarks.
(2) Admission into evidence of pre-September 1959 Expenditures.
(3) Admission of testimony of investors not named in the indictment.
(4) Improper cross-examination of defendant Adler.
(5) Prejudicial response of government's investor witness.
(6) Improper hypothetical question posed by trial judge.
(7) Introduction of Exhibit 508.
(8) Length of trial prejudicial.
(9) Introduction of hearsay evidence.
(10) Variance between proof and indictment.
(11) Improper instruction with regard to the use of the mails.
(12) Denial of appellants' requested instruction in answer to jury's request for additional instruction.
(13) Refusal to give appellant Kroll's requested stock ownership instruction.
(14) Refusal to give appellants' requested instruction on reliance upon advice of counsel.

here and discussed *infra* it is not necessary that we recount in detail the lengthy and involved scheme alleged. Succinctly stated, it was alleged that the defendants engaged in an intensive campaign whereby risky and virtually worthless mortgages were purchased from sources affiliated with ABM, a company established to deal in mortgages, were represented to be fully insured as to interest and principal by what in fact was a financially unsound ABM-affiliated insurance company, and wer sold to the public by means of false and misleading advertisements and other false statements made to investors. In December, 1961, ABM was petitioned into bankruptcy along with its affiliated companies after allegedly defrauding investors of millions of dollars.

We proceed to discuss in some detail the points raised which we consider worthy of discussion.

I.

Sufficiency of Evidence To Sustain Conviction

Each of the defendants except Cahn asserts that there was insufficient evidence in the record to support his conviction, and that it was error for the court to deny the respective motions for judgments of acquittal. On a motion for judgment of acquittal the test is whether, in the view most favorable to the government, a reasonably-minded jury might accept the relevant evidence as adequate to support a conclusion of the defendants' guilt beyond a reasonable doubt. *Glasser* v. *United States* (1942), 315 U.S. 60, 60, 62 S.Ct. 457, 86 L.Ed. 680; *Mortensen* v. *United States* (1944), 322 U.S. 369, 64 S.Ct. 1037, 88 L.Ed. 1331; *Davis* v. *United States,* 5 Cir. 1967, 385 F.2d 919; *Lambert* v. *United States,* 5 Cir. 1958, 261 F.2d 799; *Vick* v. *United States,* 5 Cir. 1954, 216 F.2d 228, 232. These jury verdicts, then, must be permitted to stand if there is substantial evidence to support them, taking the view most favorable to the government, without weighing conflicting evidence or

testing the credibility of the witnesses, and allowing in favor of the verdicts all reasonable inferences from the evidence.

The government introduced evidence tending to prove that the defendants developed a highly-organized sales campaign replete with half-truths, misrepresentations, and other deceptive techniques in order to interest investors in purchasing mortgages. The salesmen were furnished with complete sales kits extolling the financial soundness of the program offered. The sickly financial condition of ABM was not disclosed to investors. Salesmen were instructed to tell prospective investors that the mortgages were on "preferred, selected, single-family Florida homes", when in truth many of the mortgages encumbered much less desirable properties. It was represented that the mortgages were insured by a policy which was authorized by the Florida Insurance Commissioner, when the Commissioner had not so approved the policy. Investors were told that investments in mortgages were 100% safe because the mortgages were insured, when in fact the ABM-affiliated insurance company was inadequately financed to insure fully the risks presented. Relevant matters withheld from investors included: ABM's lack of mortgages in inventory, the poor quality and near worthlessness of mortgages assigned, the fact that mortgages were often on vacant land and hence uninsurable or illegally insured under Florida law, the fact that mortgages were junior to other liens of millions of dollars, and finally the fact that the insurance bonds were of little protection and were issued by an insurance firm affiliated with ABM. Evidence indicated that investors' funds were used to make interest payments to other investors because defaults on mortgages had reduced ABM's cash supply. Evidence also tended to show that the defendants had improperly diverted company funds for their own personal use, and for the purpose of financing other projects of interest to the defendants.

Defendants contend that they relied in good faith on the advice of counsel in operating this business. Significantly, however, the counsel upon whose advice they claim they relied was not called as a witness. In fact evidence was introduced by the government that house counsel had admonished the defendants that delivery of mortgages before houses were completed on the properties might be fraudulent, and that Florida law did not allow insurance of vacant lot mortgages. Outside counsel had also advised that apparent misrepresentations might be violations of the anti-fraud provisions of the securities laws. Letters from Aetna and Kemper insurance executives, who issued fidelity bonds to ABM, indicate their concern over misrepresentations made in ABM's advertising. Nevertheless the operation continued.

Although the numerous defendants were involved at different times and to differing degrees in the perpetration of this scheme, there was plentiful evidence at trial from which a jury could reasonably find beyond a reasonable doubt that all participated knowingly in the unlawful acts for which they were indicted. The defendants were free to introduce evidence of good faith reliance upon counsel as tending to prove they lacked criminal intent, but the jury was not bound to accept this evidence. The record contained other competent evidence from which the jury could find that the defendants in fact acted with the requisite intent to defraud.

II.

Pre-indictment Delay

The indictment which was returned on February 15, 1966, alleged that the conspiracy terminated on December 31, 1961. The appellants contend that they were deprived of a fair and speedy trial by virtue of a delay of over four years measured from the date of termination of the scheme to the date of the return of the indictment.

The applicable statute of limitations in this case is five years. It is well-settled in this Circuit that the Sixth Amendment right to a speedy trial and the rights granted by F.R.Crim.P. 48(b) do not accrue to a defendant until after a prosecution is instituted. *Grayson* v. *United States,* 5 Cir. 1969, 416 F.2d 1073, 1076-77, cert. denied 396 U.S. 1059, 90 S.Ct. 754, 24 L.Ed.2d 753 (1970); *Harlow* v. *United States,* 5 Cir. 1962, 301 F.2d 361, cert. denied 371 U.S. 814, 83 S.Ct. 25, 9 L.Ed.2d 56 (1962). Any delay between commission of the crime and indictment is controlled by the applicable statute of limitations. *Grayson* v. *U. S.,* supra; *Bruce* v. *United States,* 5 Cir. 1965, 351 F.2d 318, cert. denied 384 U.S. 921, 86 S.Ct. 1370, 16 L.Ed. 2d 441 (1966). The defendants urge that we adopt the reasoning of *United States* v. *Parrott,* 248 F.Supp. 196 (D.D.C. 1965), wherein an indictment was dismissed in part because the court found that the defendants had been unduly prejudiced by unexcused pre-indictment delay. Even if *Parrott* was the applicable law of this Circuit—which it is not—the case would not be applicable to the situation at hand, for the defendants have not sufficiently demonstrated any prejudice stemming from the lapse of time prior to indictment.

III.

Grand Jury Array

The defendants allege that the grand jury selection process in the Southern District of Florida is discriminatory and does not represent a fair cross-section of the community. This contention was specifically rejected in *Stassi* v. *United States,* 5 Cir. 1968, 401 F.2d 259.

IV.

Cahn's Motion for Continuance

Defendant Cahn argues that the trial court abused its discretion in denying his motion for a continuance so that counsel might have additional time to prepare for

trial. After the indictment was filed Cahn was initially represented by an attorney who filed various pre-trial motions and participated in pre-trial proceedings. Four weeks prior to trial, this attorney was allowed to withdraw from the case with respect to representation of Cahn. Cahn took sixteen days thereafter to retain new trial counsel. Twelve days prior to trial new counsel made an oral motion for continuance. The court denied it immediately.

Apart from calling attention to the shortness of time for preparation, Cahn has not demonstrated that trial counsel was prevented from properly defending him or that he was otherwise prejudiced by being required to go to trial. In fact, the record shows that trial counsel vigorously participated in the trial and demonstrated a full range of trial talents and knowledge of the case. We find no abuse of discretion by the trial judge, and no prejudice flowing to the defendant Cahn from the denial of the continuance.

V.

Severance

Defendant Kroll claims that Cahn and Criswell had testified in a prior bankruptcy hearing that Kroll did not dominate ABM as the indictment alleged. Kroll here alleges that if a severance had been granted Cahn and Croswell would have repeated their testimony exculpating Kroll, and that the joint trial deprived him of the opportunity to call the two men as his own witnesses. However, when Cahn and Criswell took the stand in their own behalf they made statements tending to exculpate Kroll. The jury was free to accept this testimony. Kroll has not demonstrated an abuse of discretion by the trial court in this respect. *Smith* v. *United States*, 5 Cir. 1967, 385 F.2d 34.

With regard to the other defendants, we likewise find no prejudice from the denial of severance. Each defend-

ant was named in each count of the indictment, and there was thus no danger that the jury would be confused or misled into considering evidence in the case of a defendant to which it did not apply. The defendants' reliance on *Bruton* v. *United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) is of course entirely misplaced. Here no confessions or out-of-court inculpatory statements by any defendants were introduced, and all of the defendants did take the stand and were fully available to each other defendant for cross-examination.

When possible without prejudice to the rights of defendants joint trial aids in the efficient administration of justice. Particularly is this so when, as here, severance would require the expense of several long trials involving substantially the same evidence. The various arguments that some of the defendants played larger roles than others in the alleged conspiracy, or that some of the defendants had allegedly "antagonizing personalities" which a jury might not like, or that the impeachment of one of the defendants might "rub off" on the other defendants, taken singly or together, do not present grounds for separate trials. The trial court fairly and fully admonished the jury during his complete and detailed instructions to consider the guilt or innocence of each defendant only upon the evidence introduced against him and to determine its verdicts separately as to each defendant under each count of the indictment.

VI.

Reading of the Indictment

Appellant Hunt urges that it was error for the trial judge to read the indictment to the jury. The trial judge's instructions informed the jury that the indictment was not evidence, that it did not raise a suspicion of guilt, and that it was merely the method by which persons

are charged and brought to trial. There was no error. *United States* v. *Press,* 2 Cir. 1964, 336 F.2d 1003, cert. denied 379 U.S. 965; *United States* v. *Martin,* 2 Cir. 1955, 223 F.2d 666, 667; *Blauner* v. *United States,* 5 Cir. 1961, 293 F.2d 723, 736; *Laughlin* v. *United States,* D.C. Cir. 1967, 386 U.S. 287, 295, cert. denied 390 U.S. 1003; *United States* v. *Hoffa,* 7 Cir. 1966, 367 F.2d 698, 713, vacated on other grounds, 387 U.S. 231. See further *Williams* v. *Beto,* 5 Cir. 1966, 354 F.2d 687, and cases there cited.

VII.

Search Question

We deal here with one of the more difficult issues of the case. Cahn complains that his motion to suppress the search of the books of an affiliated company of ABM, as well as the fruits of such search, was erroneously denied because the evidence was obtained through an unlawful search. Cahn was obtained through an unlawful search. search. Cahn was the sole stockholder and president of the company. When the company was petitioned into bankruptcy, the referee in bankruptcy ordered the trustee to take possession of and remove the records from the premises of the company. The appellants did not object to the taking of possession by the trustee. One and a half years later, an accountant for the Securities and Exchange Commission requested permission from the trustee to examine the books. Permission was granted. The accountant remained on the scene for two years and evidence gathered as a result of the examination was presented to the grand jury and at trial. The two principal issues raised are (1) Cahn's standing to object to the search, and (2) the authority of the trustee to consent to the search.

Our discussion begins with *Jones* v. *United States,* 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960). Jones was the occasional guest of the owner of an apartment. The

owner had given Jones the key. The police searched the apartment while Jones was present, and seized narcotics which they found in a bird's nest in an awning outside the window. The Supreme Court held that Jones had standing to contest the search, noting that the search was directed at Jones because his privacy had been invaded. Mr. Justice Frankfurter, writing for the Court, said:

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else". 363 U.S. at 261.

Mancusi v. *DeForte*, 392 U.S. 364, 88 S.Ct. 1154, 20 L.Ed.2d 2120 (1967), further considered the issue of standing. This case dealt with the seizure of labor union documents from an office shared by the objector and several other union officials. It was held that the official had the requisite standing to object to the search because it was a "private office" in which DeForte could reasonably expect that only union officials or their personal or business guests would enter.

In *Mancusi* the Supreme Court pointed out that standing to object to a search or seizure belong to one who has title to the premises searched, or to one who has a possessory interest in the premises, or to one legitimately on the premises where the search occurs. It was further there stated that *Katz* v. *United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), established that the right to claim the protection of the Fourth Amendment depends not only on a property right in the invaded place, but also upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion.

In *Alderman* v. *United States,* 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969), the Supreme Court reaffirmed the vitality of *Jones*:

> "Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppression of relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy."
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> * * * * *
>
> "The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment. But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth". 394 U.S. 173-75.

Mr. Justice Fortas dissented in *Alderman,* urging:

> "The Government violates his rights when it seeks to deprive him of his liberty by unlawfully seizing evidence in the course of an investigation of him and using it against him at trial".

Although concededly the question is close we conclude that Cahn does not have standing to complain about the search. Once the corporation was in bankruptcy, Cahn no longer had any title in the corporate records, as title passed by operation of law to the trustee in bankruptcy. Title 11, U.S.C., Section 110; *Bisno* v. *United States,* 9 Cir. 1961, 299 F.2d 711. Neither did Cahn have any possessory

interest in the corporate records. The records were examined on the premises of the trustee in bankruptcy, and no area in which Cahn had an interest was violated. Only corporate records, and not personal records of Cahn were examined. In this regard, see also *Elbel* v. *United States,* 10 Cir. 1966, 364 F.2d 127.

We think also that any "reasonable expectation" or agency argument proceeds on an erroneous concept of the role of a trustee in bankruptcy. The trustee is not the exclusive agent of the bankrupt, but rather is an officer of the court and a representative of creditors as well. Title 11, U.S.C., Sections 74 and 110; *Ansbacher & Company* v. *Klebanow,* 2 Cir. 1966, 362 F.2d 569. A trustee is a person appointed by the court to manage the estate in the midst of the bankruptcy proceedings, to conserve the assets, and to put the business affairs of the bankrupt in sufficient order to facilitate the dissolution of the business and the distribution of assets to creditors and those holding equity interests. We think it significant that the trustee is under a duty to report to the United States Attorney any probable criminal violations of the bankruptcy act and to disclose to that official all relevant information. Title 11, U.S.C., Section 3057. In light of the strong governmental interest in protecting creditors in a bankruptcy situation a bankrupt would indeed be short-sighted if he did not perceive that many interested parties, governmental or otherwise, might be interested in examining the books of the bankrupt business. Reasonable expectations are that government officials will be examining the books.

Henzel v. *United States,* 5 Cir. 1961, 296 F.2d 650, is not inconsistent with the result reached here. A general levy had been made on the corporation of which Henzel was the sole shareholder and president. The corporate premises searched by the Postal authorities with permission of the sheriff were still maintained by Henzel as his daily working office, and it was clear that there was an

improper invasion of an area in which he had a possessory interest at the time of the search. *United States* v. *Kanan*, 225 F.Supp. 711 (D. Ariz. 1963), involved a search made with the permission of a receiver appointed under Arizona law. Because of the limited powers of a receiver under state law that case may be dismissed as not inconsistent with the result here reached, but even assuming that it is inconsistent, we choose not to adopt the *Kanan* reasoning. We also note with interest a recent article, "Standing to Object to Search and Seizure", 118 University of Pennsylvania Law Review 333 January 1970), which details some of the problems and legal inconsistencies which pervade this area of the law. Although arguing for a broader rule on the issue of standing, the authors acknowledge that the Supreme Court cases discussed above establish the law as it is today. Perhaps the suggestions contained in the article, which would give Cahn stronger grounds to claim standing here, merit consideration by the Supreme Court in some future case or controversy. We are of the view that the law as it now stands will not support Cahn's claim of standing. In view of this conclusion, we pretermit discussion of the question raised as to the bankruptcy trustee's authority to consent to the search.

VIII.

Summary Charts

All of the appellants object to the admission of summary charts reflecting the disposition of funds by ABM and its affiliates. The charts were prepared from records of those companies by Securities and Exchange Commission examiners. The underlying records were marked for identification but were never introduced into evidence. The appellants urge that summaries may not be admitted when the records upon which they are based have not been introduced into evidence.

The weight of authority stands for the proposition that summaries prepared by an expert accountant of corporate

records are admissible even though the records themselves are not admitted into evidence. Rather, it is required that the records must be available (ordinarily in court, unless too bulky and cumbersome) for the defendant's inspection. *Bruce* v. *United States,* supra; *McDaniel* v. *United States,* 5 Cir. 1965, 343 F.2d 785, cert. denied 382 U.S. 826; 4 Wigmore on Evidence, 3rd Ed., Section 1230.

IX.

Prejudicial Closing Argument

Appellants Criswell and Hunt contend that it was error for the prosecutor to allude in his rebuttal closing argument to the failure of the appellants to call any investors to the stand. One of the defenses relied on by the appellants was that they had a good faith belief in the success of the company and tried to protect investors' funds, but the appellants presented no investor witnesses to testify that they had been dealt with fairly by the appellants. The prosecutor called this failure to the attention of the jury.

Smith v. *United States,* 5 Cir. 1956, 234 F.2d 385, states:

> ". . . the rule against commenting on the failure of a defendant to testify in his own behalf 'does not go to the extent of forbidding argument by counsel for the prosecution to the effect that the evidence against a defendant is uncontradicted'. The same is true with respect to a failure to produce testimony on any phase of the defense upon which the accused seeks to rely".

The prosecutor's comment was well within established limits of propriety.

X.

Instructions as to Good Faith Defense

The appellants Cahn and Kroll urge that the trial judge erred in refusing to give their proposed instructions on good faith. The appellee concedes that the defendants were

entitled to have their defense of good faith squarely presented to the jury, but contends that the jury was fairly informed by the general instruction of the reliance on good faith as a defense. The appellee further asserts that the appellants failed to object to the charge given by the court, and that therefore here reversal can only be predicated on "plain error" which they argue was not committed. See Rules 30 and 52(b), F.R.Crim.P. We agree with the government's position as to both points.

Even though a proposed charge is a proper statement of the law and the evidence warrants such a charge, a defendant is not necessarily entitled to have the charge presented to the jury in the exact words proposed so long as the substance of the proposition is fully and fairly conveyed to the jury. The charge ultimately given by the court was disclosed to counsel during a protracted charge conference the day before counsel argued the case to the jury. We set it out in the margin.[3] The appellants contend that the words "any false representations by a defendant" led the jury to conclude that the good faith defense only applied to statements made by the defendants and not to actions of the defendants. They say that this was error of prejudicial proportions requiring reversal of their convictions.

Not so, in our judgment. The trial judge in his instructions fully covered the elements of each offense charged and the meaning of the words "knowingly", "willingly" and "intent to defraud". Moreover, each of the defendants took the stand and made it clear that he relied on his good faith as a defense, categorically denying *malam fides*

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[3] The portion of the charge in dispute was given as follows:

"As to counts 1 through 8, 11, 13, and 14 of the indictment, any false representations made by a defendant must have been known by him to be false. A good faith belief in the truth of statements made is a complete defense to the charges of fraudulent misrepresentations." (R. 4110-11).

or intent to defraud. The government maintains—and we think with justice—that in the overall context of the trial and the charges the jury was fairly presented with the good faith defense. See *New England Enterprises, Inc.* v. *United States,* 1 Cir. 1968, 400 F.2d 58, cert. denied 393 U.S. 1036; *Beck* v. *United States,* 10 Cir. 1962, 305 F.2d 595. Perhaps the trial judge might have chosen words which would have more precisely conveyed that acts as well as words are included within a defense of good faith, but in a comprehensive view of this long trial (the record encompasses 4200 pages) the slight difference in nuance or accent pointed out is of minimal import. The defense was before the jury.

Further and of critical significance, we find the record bare of any objection by counsel for Cahn and Kroll to the charge as finally given by the trial judge. Before the jury began its deliberations, full opportunity to object (as contemplated by Rule 30, F.R.Crim.P.) was given, but no objection was voiced as to this phase of the instructions. Cahn's requested instruction No. 9 included a charge on good faith which covered acts as well as statements. Although a colloquy occurred during the charge conference between the trial judge and counsel for appellants Hunt and Adler over the wording of the good faith instruction which the judge proposed to give (R. 4001-4010), and finally gave, we find no indication that counsel for Cahn and Kroll joined in that discussion or made any objections to the court's proposed good faith instruction. Counsel was told that the court would "think about" amending its own instruction covering good faith as a defense.

The following morning, just prior to the start of argument to the jury, the court went over with counsel several other matters reserved from the charge conference. Good faith as a defense was not again alluded to. No one pointed out to the court that this question had been reserved for further consideration. (R. 4056-4060) This failure to object occurred immediately following an explicit admoni-

tion from court to counsel that: "Between now and the time that the jury is retired you are going to have to comply with the rules and specifically state the specific instruction to which you are objecting" (R. 4055).

After completing his instructions to the jury, the court again gave counsel the opportunity to object to the charges contemplated by Rule 30, F.R.Crim.P. (R. 4127-37). The court specifically noted that each and every defendant had been given the benefit of an objection to those instructions which had been proposed and refused by the court during the charge conference, but was explicit in stating that specific objections were required to any charges given by the court and found objectionable (R. 4128-29). The court further noted that while every defendant was allowed an objection as to those charges which he individually had requested and been refused, no party was given the benefit in the record of objections made by any other defendant. (R. 4130-31). The court restated its position by commenting that the requests to charge had not been made jointly, and would not be so considered for purposes of objections. (R. 4131). In the face of these repeated and rather laborious invitations to object and secure rulings, neither Cahn nor Kroll objected to the instructions as to good faith as a defense.

We have taken pains to relate these matters at some length in order to demonstrate the basis for our holdings: (1) that the point was not preserved for review by Cahn and Kroll, and (2) that we are not here justified in applying the "plain error" rule. Rule 52(b), F.R.Crim.P.

XI.

Sentence Correction

Kroll argues that he was subjected to an illegal sentence when the trial judge originally ordered five year concurrent sentences, and moments later changed the sentences so that two of the five year sentences would

run consecutively. No error was committed. See *Bozza* v. *United States,* 330 U.S. 160, 67 S.Ct. 645, 91 L.Ed. 818 (1947); *Williams* v. *United States,* 5 Cir. 1970, 422 F.2d 1318; *Vincent* v. *United States,* 8 Cir. 1964, 337 F.2d 891, cert. denied 380 U.S. 988.

We have carefully considered the record and briefs with respect to the claims of each appellant. Error in the trial and conviction is not demonstrated as to any appellant. The judgment appealed from is

AFFIRMED.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1314

MARK H. KROLL, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1435

WILLIAM CAHN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 433 F. 2d 1282.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1970. A petition for rehearing was denied on December 10, 1970, as to petitioner Kroll and on January 6, 1971, as to petitioner Cahn. Mr.

421-635—71

Justice Black extended the time for filing Kroll's petition for a writ of certiorari to February 8, 1971, and Mr. Justice Douglas extended the time for filing Cahn's petition to March 4, 1971. Kroll's petition was filed on February 5, 1971, and that of Cahn on March 4, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the sole stockholder of a bankrupt corporation has standing to contest the use of corporate records obtained with the consent of the trustee after the trustee had obtained possession and control of them.

2. Whether, in the circumstances of this conspiracy prosecution, one of the defendants was entitled to a severance from the others.

3. Whether the time which elapsed between termination of the fraudulent scheme and the return of the indictment deprived the defendants of their right to a fair and speedy trial.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioners and five co-defendants were convicted of conspiracy to violate 15 U.S.C. 77q(a) and 18 U.S.C. 1341, seven counts of fraud in the sale of securities in violation of 15 U.S.C. 77q(a), and four counts of mail fraud in violation of 18 U.S.C. 1341. Petitioners were each sentenced to terms of imprisonment of five years on Count 1 and five years on Count 2 to run consecutively, and five years on each of the remaining counts, to run concurrently with each other and with the sen-

tence on Count 1. Petitioner Cahn was ordered to pay a fine of $5,000 on each of three counts, making a total fine of $15,000. Petitioner Kroll was ordered to pay a fine of $5,000 on each of six counts and $10,000 on Count 15, making a total fine of $40,000. The Court of Appeals affirmed (Pet. App. 1a–18a).

The evidence at trial[1] showed that mortgages and mortgage notes were offered for sale pursuant to a promotional campaign involving false and misleading advertising as well as omissions and untrue statements of material facts (Tr. 432–434, 484–485, 715–721, 1207, 1506–1515, 1612–1613, 1715, 1900, 1977, 2043–2045, 2518, 3430). The securities were issued by American Bonding Mortgage Co., Inc. (ABM), which was owned by Kroll and supervised and run by Cahn. (Tr. 410–422, 427–435). Although ABM was insolvent from its inception, it nevertheless accepted from investors, during the approximately four years of its operation, over $9 million (Tr. 2719, 2867). These funds were used to finance large advertising, travel, entertainment and promotion expenses, the development and purchase of real estate, payment of interest to investors for whom mortgages had not yet been secured, purchase of mortgages of questionable value, and numerous personal expenses of the defendants (Tr. 817, 920, 927–928, 938–939, 1238, 1242, 2004–2005, 2365–2368, 2728, 2736, 2740, 2748, 2794–2795, 2826–2841, 2852, 2856–2860, 3183, 3629).

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[1] A further statement of the evidence appears in the brief in opposition to the petition of a third co-defendant, Adler, whose petition is pending as No. 1191 this Term.

In order to retain complete control over these transactions, ABM formed a complex network of subsidiary corporations, which were presented to the public as being independent, but which in fact were so interrelated that they operated as one business. (Tr. 427, 915–919, 1016–1018, 1140–1144, 1393–1395, 1409, 1612–1613, 1715, 1900, 2055, 2146, 2381–2382, 2399, 2419, 2518, 2773–2776, 2819–2823, 3176–3178, 3275). For example, petitioner Cahn controlled First Bonded Corp. which, like ABM, operated by purchasing mortgages with money given in trust by the investors. He also formed Aspic Investment Co., which purportedly was to find and acquire mortgages for ABM to assign to investors (Tr. 637–643; 2700–2824). And, after purchasing property at Appollo Beach, he set up Flora Sun Corporation, and sold uninsured mortgages on this vacant and unimproved land, representing that it was owner-occupied land and that the mortgages were insured (Tr. 1016–1018, 1140–1144, 1393–1395, 1409, 1575, 1612–1613, 1715, 1900, 2055, 2078, 2381–2382, 2399, 2419, 2518, 2503).

Petitioner Kroll owned Michigan Surety Co. and later Pan American Surety Co., both insolvent corporations. These companies purportedly insured the mortgages of ABM and First Bonded, but although the mortgages were continually in default, no claims were ever made against them (Tr. 1012, 1604, 1611–1612, 2188–2209, 2216, 2219–2234, 2620, 2623, 2641). A review of their books disclosed that both ABM and Aspic Investment loaned substantial sums raised from their investors to both Flora Sun and Michigan Surety without requiring collateral, without charging

interest, and, indeed, without ever being repaid (Tr. 2812–2824).

ARGUMENT

1. Petitioner Cahn lacks standing to contest evidence obtained through examination of the records of a bankrupt corporation with the consent of the trustee in bankruptcy. At the extensive hearing on his motion to suppress, which was denied by the trial court (Tr. 620–648 J), it was disclosed that ABM (of which Cahn was the sole stockholder) was petitioned into bankruptcy in December 1961, and that all of its corporate records were then placed in the custody of a receiver and later of a trustee, John Nicholas. To avoid high rent for office space, the referee in bankruptcy authorized the trustee to take possession of the corporate records and remove them to a room adjoining his office. Petitioners did not object. In November 1965, an accountant from the Securities and Exchange Commission, George M. Callahan, requested and was given permission by the trustee to examine the corporate records (Tr. 620–637). Petitioner was not notified (Tr. 639). Later, the government obtained an *ex parte* court order authorizing it to remove the records Mr. Callahan needed for his investigation from the trustee's office (Tr. 629–630); the trustee was given a receipt whenever any of the records were removed (Tr. 627). The resulting evidence was presented to the grand jury in February 1966.

Since petitioner Calm had neither title to the corporate records[2] nor a possessory interest in them,[3] he is not a person aggrieved by their examination. See *Mancusi* v. *De Forte*, 392 U.S. 364; *Alderman* v. *United States*, 394 U.S. 165. The right of a bankrupt to protest use of corporate records as evidence against him ceases as soon as possession and control over them pass from him to the receiver and the court. *Dier* v. *Banton*, 262 U.S. 147, 149–150; *Ex Parte Fuller*, 262 U.S. 91; see *United States* v. *Hopps*, 331 F. 2d 332, 341 (C.A. 4), certiorari denied, 379 U.S. 820. As an officer of the court and a representative of the creditors, the trustee had both full power to manage the affairs of the bankrupt estate (11 U.S.C. 11(a)(5), 75, 110) and the duty to report to the government any possible criminal violations of the bankruptcy act (18 U.S.C. 3057).[4]

2. Petitioner Kroll was not entitled to a severance from the other defendants. As the trial involved a charge of conspiracy with evidence of joint participation of the petitioner and his co-defendants in the various frauds, a joint trial was proper to avoid several lengthy trials presenting the same evidence. *Opper* v. *United States*, 348 U.S. 84, 95; *Stilson* v. *United*

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[2] *Bisno* v. *United States*, 299 F. 2d 711, 717–718 (C.A. 9), certiorari denied, 370 U.S. 952. See also *United States* v. *Masterson*, 383 F. 2d 610, 613–614 (C.A. 2), certiorari denied, 390 U.S. 954.

[3] *Elbelt* v. *United States*, 364 F. 2d 127, 136–138 (C.A. 10), certiorari denied, 385 U.S. 1014.

[4] Calm's petition also incorporates by reference the question presented in No. 1191, which we discuss in our response to that petition, and the second question in Kroll's petition, which we discuss, *infra*, pp. 7–8.

States, 250 U.S. 583, 585–586; Pet App. 8a. In order to avoid prejudice, the trial court ruled that the co-defendants, and any other witness defense counsel named, be asked in camera whether they were willing to testify or were going to invoke the privilege against self-incrimination (Tr. 280). Since there is no showing of prejudice in this case, the district court's ruling should not be reversed. *Schaffer* v. *United States*, 362 U.S. 511.

Petitioner Kroll's claim of prejudice is that his co-defendants Cahn and Criswell, who had made exculpatory statements in the bankruptcy proceedings as to Kroll's role in ABM, could not be required to testify as witnesses in the joint trial. In fact, however, both Cahn and Criswell took the stand in their own behalf; each testified, as they had at the bankruptcy proceedings, that petitioner Kroll did not control or dominate the operations of ABM (Tr. 3168, 3458). Although they had declined to testify as witnesses for Kroll as such (Tr. 2945, 2947), their subsequent testimony necessarily had the same effect as if they had done so.

3. Petitioner Kroll also contends that he was deprived of a fair and speedy trial by a delay of more than four years between the termination of the scheme in December 1961, and the return of the indictment in February 1966. The relationship between pre-indictment delay and speedy trial or due process claims is already before the Court in *United States* v. *Marion*, No. 810, probable jurisdiction noted, March 1, 1971. However, whether that issue depends upon the circumstances—such as the length of the delay, the reasons for it and the reasonable possibility of preju-

dice—or is controlled, as the Fifth Circuit holds,[5] solely by the applicable statute of limitations, reversal would be inappropriate here. The statute of limitations is five years in this case; and there was no undue delay by any test. The complex fraud which the defendants had created could not be unraveled in short order. The record shows, and the court of appeals found in the alternative (Pet. App. 6a), that the delay caused no prejudice. No material records were missing, and the witnesses' recollection remained generally clear. In these circumstances, we believe the Court need not withhold action on these petitions.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petitions for writs of certiorari should be denied.

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APRIL 1971.

[5] See *United States* v. *Grayson*, 416 F. 2d 1073 (C.A. 5), certiorari denied, 396 U.S. 1059; *Harlow* v. *United States*, 301 F. 2d 361 (C.A. 5), certiorari denied, 371 U.S. 814. Compare the jurisdictional statement for the United States in *Marion*, *supra*, at pp. 5-7.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1314

MARK H. KROLL, *Petitioner,*

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

In response to the Brief for the United States in Opposition, the petitioner emphasizes two factors relevant to this Court's consideration of the Petition:

1. The Pendency of the Marion Appeal Justifies Either a Grant of This Petition or a Withholding of Action Thereon

The brief of the Solicitor General mistakenly states (p. 7) that this Court noted probable jurisdiction on March 1, 1971, of the appeal in *United States* v. *Marion,*

No. 810. Actually, this Court postponed the question of jurisdiction to the hearing on the merits, which will occur next Term.[1] Thus, depending on the outcome of the jurisdictional problem, this Court may or may not have to resolve the "relationship between pre-indictment delay and speedy trial or due process claims" (Opp. Br. 7) in the *Marion* appeal.

The uncertainty as to whether this Court will reach the speedy trial issue in *Marion* suggests the appropriateness of granting certiorari in this case and setting the oral argument immediately following the *Marion* argument. As the Solicitor General stated in his Jurisdictional Statement in *Marion* (p. 5), at issue in *Marion* "are several important questions relating to the right to a speedy trial, not yet decided by this Court and not uniformly resolved in the lower courts." And the Solicitor General has not in his Opposition Brief in this case pointed to any significant differences between the "several important questions" in *Marion* and those in the instant case. The grant of certiorari in this case, where there are no jurisdictional hurdles, will thus insure a resolution of the issues that the Government has told this Court are worthy of review. That the

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[1] The appellee in the *Marion* appeal moved to dismiss the appeal on the ground that dismissal of an indictment for unnecessary delay in presenting the charge to a grand jury is not a "decision or judgment" of a district court subject to direct review by this Court under 18 U.S.C. § 3731, as it existed prior to the recent amendment abolishing such direct review. Presumably that is the jurisdictional problem to be overcome before this Court can consider and resolve the merits of the speedy trial controversy in *Marion*.

issues in the two cases are substantially identical is shown by the following comparison:

Marion *Jurisdictional Statement*	*Kroll* *Petition*
1. Question presented (p. 2): "Whether an indictment may properly be dismissed because of pre-indictment delay that was not purposeful, oppressive or actually prejudicial to the defendants."	1. Question presented (p. 2): "Whether, in assessing the right to a speedy trial under the Sixth Amendment or under Rule 48(b) of the Federal Rules of Criminal Procedure, pre-indictment delays by the Government are to be considered where the indictment is filed within the applicable limitations period." The Government's counter-statement of the question presented (Opp. Br. 2): "Whether the time which elapsed between termination of the fraudulent scheme and the return of the indictment deprived the defendants of their right to a fair and speedy trial."
2. A substantial "threshold matter" is said (p. 5) to be "Whether the alleged commission of an offense and the initiation of criminal proceedings is to be considered at all in a speedy trial claim." As to that matter, lower courts are not in uniform agreement, but most courts "generally look to the statute of limitations as exclusively controlling the question of pre-indictment delay."	2. The Fifth Circuit, it is here noted (p. 24), has held that the speedy trial rights "do not accrue to a defendant until after a prosecution is initiated" and any delay between commission of the crime and indictment "is controlled by the applicable statute of limitations." Concededly, there are lower court differences of opinion on this matter.
3. The dismissal of the *Marion* indictment, it is said (p. 7), "solely because of pre-indictment delay was erroneous in the instant case," particularly since there was no showing that the Government's delay was "purposeful or oppressive."	3. Here, the petitioner claims (p. 27), his allegation is uncontradicted on the record "that the Government had known of the alleged crimes years before the filing of the indictment and was thus dilatory, without cause, in seeking the indictment." Such delay is said "to be unreasonable and arbitrary".

Marion
Jurisdictional Statement

4. The Government asserts in the *Marion* case (p. 8) that there was no establishment of "serious prejudice to the appellees" even if the delay was purposeful or oppressive. The appellees "were not incarcerated and the only conceivable harm from pre-indictment delay would be increased difficulty in reconstructing relevant evidence which has not been preserved through documentation" — an "inherent prejudice" that has not hitherto been deemed to warrant dismissal save in one "unusual and clearly distinguishable case."

Kroll
Petition

4. The Petition states (pp. 27-28) that until the proper period for measuring the speedy trial claim has been established, petitioner's proof of prejudice cannot appropriately be assessed. The burden may be on the Government to prove the reasonableness of its delay, rather than on the defendant to prove pre-indictment prejudice. In any event, there are uncontradicted assertions in the record that during the pre-indictment delay many documents essential to the defense became scattered and lost, some witnesses became difficult to find, and the memories of all individuals concerned were dimmed by the passage of time.

The Opposition Brief (p. 8) merely states that the delay here "caused no prejudice" since "No material records were missing, and the witnesses' recollection remained generally clear." But if that assessment of the record is accepted, we have a situation not unlike that in *Marion*, where there is allegedly only "inherent prejudice" in the form of possible "increased difficulty in reconstructing relevant evidence which has not been preserved through documentation."

The parallelism of these two cases at the very least justifies withholding action on the instant petition until this Court has finally acted on the *Marion* appeal. If this Court should reach the speedy trial question in *Marion* and should it affirm the lower court's dismissal of the indictment, the judgment below in this case could

not stand; reconsideration of the matter by the district court or the Fifth Circuit would possibly be in order, depending on the nature and scope of this Court's ruling in *Marion*.[2] Thus, unless the Petition were to be granted as above suggested, withholding of action thereon does become appropriate.

2. The Importance and Reviewability of the Severance Question Are Not Diluted by the Trial Testimony of the Exculpatory Co-Defendants

The Solicitor General (Opp. Br. 7) seeks to counter the important question whether a severance is necessary to permit use of exculpatory testimony earlier given by the principal co-defendants, Cahn and Criswell. He does so by reiterating the irrelevant fact that Cahn and Criswell did testify at the trial that petitioner Kroll did not control or dominate ABM—which

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[2] The Solicitor General asserts (Opp. Br. 8) that such reversal "would be inappropriate here" since "there was no undue delay by any test," the statute of limitations being five years and the complexity of the fraud making impossible a quick unraveling by the Government. But one of the questions raised here and in *Marion* is whether a delay shorter than the period of limitations, in a situation involving a complex fraud, can be so unreasonably and seriously prejudicial to the defendant to require relief under the Sixth Amendment or the Fifth Amendment's due process clause. And a necessary part of that question is whether the limitations period or the complexity of the alleged crime can be used to dissipate whatever prejudice may be said to accrue to the defendant by virtue of the pre-indictment delay. As of now, no one can properly or confidently say whether "there was no undue delay [here] by any test."

Moreover, the Solicitor General's assertion (Opp. Br. 8) that the "complex fraud" in this case "could not be unraveled in short order" is undermined by his earlier comment (Opp. Br. 5) that an S.E.C. accountant examined the corporate records in November 1965 and the "resulting evidence was presented to the grand jury in February 1966." Obviously the unraveling was of fairly "short order."

control was the principal and critical factor in the Government's effort to connect Kroll with the conspiracy. At the same time, it is both ironic and significant that the Solicitor General, after asserting (Opp. Br. 5) that ABM "was owned by Kroll," actually concedes in the course of opposing Cahn's petition in No. 1435 that "Cahn was the sole stockholder" of ABM (Op. Br. 5).

But the question put to this Court by petitioner concerns the severance right in relation to the opportunity to use *prior* exculpatory testimony, given by the co-defendants at an earlier time when they were not under the cloud of a criminal indictment. Whatever they may have testified at the trial, the co-defendants were necessarily viewed by the jury as men struggling for their own vindication. It was impossible to give that trial testimony the same weight and credibility that might have attached to earlier testimony given in a civil proceeding freed of all the inhibitions and implications of a criminal proceeding.

And it is in this context of granting severance to permit use of *prior* exculpatory evidence—barred here by the provisions of 11 U.S.C. § 25(a)(10)—that the decision below is in conflict with *United States* v. *Echeles,* 352 F. 2d 892 (7th Cir. 1965). Significantly, the Solicitor General has not denied that conflict. Nor has he denied the importance of the severance problem as related to *prior* exculpatory evidence. See Petition, pp. 17-23.

CONCLUSION

These reasons, supplementing those in the Petition, justify the grant of certiorari, or at least a withholding of action until the *Marion* appeal, No. 810, has been decided.

Respectfully submitted,

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